Supreme Court, U.S.
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No. 99-1

(2)

In The

Supreme Court of the United States

HOLLY WHITE,

Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN and LORI ANNE CHOZEN,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule its decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), and create a new constitutional right to establish paternity in an estate proceeding when paternity had not been established prior to the death of the putative father and when establishing such paternity would require the exhumation of human remains.

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STATEMENT OF THE CASE

Petitioner asks this Court to grant certiorari to decide whether the United States Constitution entitles her to exhume the body of her putative father, dead for over 38 years, in order to obtain a tissue sample and initiate a paternity proceeding so as to make a claim against the estate of her putative grandmother. The decision Petitioner would have this Court review is a non-precedential decision of the Oklahoma Court of Civil Appeals[1] construing Okla. Stat. tit. 84., § 215 in a manner that, petitioner concedes, is entirely consistent with this Court's holding in *Lalli v. Lalli*, 439 U.S. 259 (1978). Petitioner expressly asks that this Court (i) overrule *Lalli* and (ii) declare unconstitutional Okla. Stat. tit. 84, § 215 (1991), as applied in this case.

Petitioner advances two arguments for granting the writ – that cases subsequent to *Lalli* have rendered the underpinnings of that case unsound, and that scientific developments have had the same effect. Both arguments are based on a misapprehension of the premises underlying *Lalli* itself, a misreading of the subsequent case law, and a misguided view as to the role this Court should play in addressing the extraordinary social policy implications of advances in genetic identification. Moreover,

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[1] Under Oklahoma law, state trial courts are free to disregard published decisions of the Oklahoma Court of Civil Appeals unless the Supreme Court of Oklahoma has expressly approved the decision for publication. *Sholer v. State*, 945 P.2d 469, 473 (Okla. 1995); Rules of the Oklahoma Supreme Court, Rule 1.200(c)(2). The Oklahoma Supreme Court merely denied certiorari in this case (Pet. App. at 16a).

even taking Petitioner's arguments on their own terms and assuming that reconsideration of settled precedents in this area were justified at this time, a multitude of reasons make this unique case extremely unsuitable as a vehicle for reviewing the Court's decisions in this area.

Factual Background

The late Gertrude Geller outlived both of her children. Her son, Jay Myers, died of leukemia in 1961. He was 24 when he died. Six years later, Mrs. Geller's first husband, Louis P. Myers, passed away. Mrs. Geller married Marshall Geller in 1975. Early in 1991, thirty years after her son's death, Mrs. Geller's daughter, Linda Myers Chozen, also passed away. In poor health and grieving the loss of her only remaining child, Mrs. Geller received a telephone call in May of 1991 from a stranger who claimed that she was Mrs. Geller's granddaughter. That stranger was the Petitioner, Holly White.

Petitioner claimed that Mrs. Geller's son, Jay Myers, was her father. In a letter to Mrs. Geller that Petitioner sent approximately two weeks after the initial phone call, Petitioner elaborated on her claim. Petitioner said that she was 31 years old.[2] She said that she had been trying for years to learn about her past but had not learned the "real story" from her mother until approximately a year earlier. She claimed that information had "flooded in" since then. Yet she admitted that the only evidence she had to support her story was the alleged statement of one

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[2] Petitioner later alleged that she was 15 months old at the time of Jay Myers' death.

of Jay Myers' high school friends, who, according to Petitioner, told Petitioner after seeing a picture of her that she reminded him of Jay.

Not surprisingly, Mrs. Geller was not receptive to Petitioner's attempts to ingratiate herself. On July 8, 1991, Mrs. Geller's attorney, Respondent David L. Fist, wrote to Petitioner and advised her that her communications had caused Mrs. Geller a great deal of emotional stress. Mr. Fist also advised Petitioner that Mrs. Geller faced the prospect of surgery in the near future and asked Petitioner not to attempt to contact Mrs. Geller until Mrs. Geller had recovered somewhat from the death of her daughter and her own health problems.

In October of 1991, some five months after Petitioner had first made contact with her, Mrs. Geller directed Mr. Fist to draft a letter informing Petitioner that Mrs. Geller did not wish to have any contact with her. Mrs. Geller explained that because of her health problems and the fact that she had survived both of her children, she was unable to cope emotionally with the situation that Petitioner's claim presented. Mrs. Geller stated that she believed that contact with Petitioner would only increase her pain, and she asked that Petitioner make no further attempts to contact her.

On June 26, 1991, approximately one month after Petitioner's initial telephone call to Mrs. Geller, Mrs. Geller executed her Last Will and Testament, which contained the following provision:

ARTICLE IX

Forced Heirship and Will Contest Clause

1. I hereby direct that should there be anyone not herein specifically or indirectly mentioned or provided for who would inherit a portion of my estate had I not executed this Will, such person or persons shall receive One Dollar ($1.00) as his, her or their sole and entire inheritance from me.

Mrs. Geller subsequently executed her First, Second, and Third Codicils to her Last Will and Testament in October of 1993, September of 1994, and February of 1997, respectively, with the "forced heirship" clause remaining intact.

At the time of the execution of her Will, and at the time she executed each of the Codicils to her Will, Mrs. Geller was aware of Petitioner's claim to be her granddaughter. At all of these times, Mrs. Geller was mentally alert and aware of the extent of her assets and the provisions she was making for their disposition. Mrs. Geller specifically communicated to Mr. Fist, the attorney who drafted her Last Will and Testament, her desire to include the forced heirship clause in her Will to address any claim Petitioner and others might make against Mrs. Geller's estate.

Mrs. Geller died on October 26, 1997.

In her letter to Mrs. Geller, and in subsequent letters to Mr. Fist and to Respondent Lori Chozen, Petitioner repeatedly disclaimed any interest in what she characterized as "the well publicized family fortune." Petitioner repeatedly stressed in this correspondence that her only interest was in tracing her ancestry and establishing her

"roots." Yet on October 29, 1997, after five years of silence and just three days after Mrs. Geller's death, Petitioner initiated an action in the District Court of Tulsa County, Oklahoma, seeking letters of administration in the estate of Mrs. Geller, a determination of heirship, and an *ex parte* Temporary Restraining Order to enjoin Mrs. Geller's husband and grandchildren from interring her body until after Petitioner could obtain a DNA sample from Mrs. Geller's body.[3] The district court refused to enter the *ex parte* order sought by Petitioner, and Mrs. Geller's body was interred in the family plot with her son and her first husband pursuant to her family's wishes.

Mrs. Geller and her family were members of the Jewish faith. Mrs. Geller, Jay Myers, and Mrs. Geller's first husband, Louis P. Myers, are all interred in the same burial plot in the Jewish section of Rose Hill Cemetery in Tulsa, Oklahoma. Mrs. Geller's spiritual advisor during her last years was Rabbi Charles P. Sherman of Congregation Temple Israel in Tulsa, Oklahoma. Rabbi Sherman submitted an uncontroverted affidavit that is part of the record of this action. In his affidavit, Rabbi Sherman stated that exhuming a body is a violation of the fundamental principles of the Jewish faith and is contrary to the basic code of Jewish law, unless the disinterment is to remove the body for burial in the Holy Land, to carry out the wishes of the deceased, or to permit the deceased to

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[3] Although Petitioner's pleadings were filed in a separate action with a separate case number, copies of Petitioner's pleadings from that action were included as exhibits to a brief filed by Respondent Mr. Fist in the instant action and are therefore included in the record of this action.

be reburied with his family, particularly his widow. Rabbi Sherman also noted that the ground where Mrs. Geller, her husband and son are buried is owned by and subject to the control of Temple Israel, and the rules and regulations of Temple Israel pertaining to the cemetery do not recognize exhumation, except in accordance with reasons permitted under Jewish law.

Proceedings Below

On November 5, 1997, Mr. Fist filed a Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees on behalf of Mrs. Geller's estate in the District Court of Tulsa County. Petitioner filed an Answer and Counterclaim seeking an intestate share of Mrs. Geller's estate as a pretermitted heir. Petitioner conceded in pleadings filed in this action that Jay Myers was never married, never adopted a child, never took a child into his home, and was never determined to be the father of any child in any paternity action prior to his death. Indeed, undisputed evidence was presented that Jay Myers was never named as a party in any paternity action prior to his death.

The District Court of Tulsa County ultimately ruled that Petitioner had no standing under Oklahoma law to contest Mrs. Geller's Will, and that decision was affirmed by the Oklahoma Court of Civil Appeals. The Oklahoma Supreme Court declined to review the decision of the Court of Civil Appeals.

Petitioner now asks this Court to grant certiorari and reverse the Oklahoma Court of Civil Appeals, on the theory that the Constitution and three of this Court's

decisions should be read as requiring the exhumation of Mrs. Geller's body or the body of Jay Myers[4] to allow her to perform DNA testing. According to Petitioner, this test will establish that she is Jay Myers' daughter and thus enable her to make a claim against Mrs. Geller's estate.

REASONS FOR DENYING THE WRIT

This Court has long held, for very good reasons, that "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in [the State] by a man dying there is committed by the Constitution of the United States and the people . . . to the legislature of that State." *Labine v. Vincent*, 401 U.S. 532, 539-40 (1971). *See, e.g., Reed v. Campbell*, 476 U.S. 852, 855 (1986) ("The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, *of course*, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted." (emphasis added)); *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (citing numerous cases recognizing that states have "an interest of considerable magnitude"

[4] As noted above, Petitioner initially sought to take a DNA sample from Mrs. Geller's body. After Mrs. Geller was interred, Petitioner contended that she should be permitted to exhume the body of Jay Myers for the purpose of DNA testing. The record is unclear as to which of the decedents, Mrs. Geller or Jay Myers, Petitioner now seeks to exhume.

in the orderly disposition of property upon death); *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) ("The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states."). Indeed, the same year the Court decided *Clark v. Jeter*, 486 U.S. 456 (1988), the most recent of the cases on which Petitioner relies, the Court observed in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489 (1988):

> [T]he State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims.

Although it is framed as a challenge to just one of the many decisions in this line – *Lalli v. Lalli* – the petition for a writ of certiorari in this case in fact urges a fundamental departure from the principles of deference to state legislative choices that underlie *all* of this Court's decisions in this area. Contrary to Petitioner's assertions, there is no tension in this Court's own cases requiring such a departure, and no conflict among courts anywhere relevant to the matter at issue.

This case would also be an extremely unsuitable vehicle for review of the Court's decisions in this area for reasons unrelated to the arguments advanced by Petitioner. It is clear that Petitioner will have no right to a recovery from Mrs. Geller's estate under Oklahoma law

because Petitioner's claims are flatly barred by the Oklahoma statute of limitations for paternity claims – an effective 19-year limitations period that exceeds the 18-year period endorsed by this Court in *Clark v. Jeter*, 486 U.S. 456, 465 (1988). In addition, Mrs. Geller expressly disinherited Petitioner in her will, and that disinheritance is effective under Oklahoma law to preclude any recovery by Petitioner from Mrs. Geller's estate.[5]

For the foregoing reasons, which will be set forth more fully below, Respondents urge that Petitioner's Petition for Certiorari be denied.

I. NEITHER SUBSEQUENT CASE LAW NOR DEVELOPMENTS IN DNA TESTING WARRANT RECONSIDERATION OF THE COURT'S HOLDING IN *LALLI*

In *Trimble v. Gordon*, 430 U.S. 762 (1977), this Court struck down a flat prohibition against paternal inheritance through intestate succession by illegitimate children. In so doing, however, this Court explicitly recognized that "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States." *Id.* at 771. Although courts, as always, must give "substantial deference to a State's statutory scheme of inheritance," *id.*, the problem the Court recognized in *Trimble* was that the sweeping

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[5] As noted *infra* at 23, these arguments were raised in the lower courts but were not addressed there because Okla. Stat. tit. 84, § 215(d) was dispositive of Petitioner's claims.

Illinois law at issue *totally* excluded *all* illegitimate children from ever inheriting from their fathers through intestate succession – even where, as in that very case, paternity had already been conclusively established and acknowledged by the father prior to his death. It was perfectly clear, in other words, that "[f]or at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under the intestacy laws." *Id.; see also id.* at 772 ("Difficulties of proving paternity in some situations do not justify the *total* statutory disinheritance of illegitimate children whose fathers die intestate."). Thus, because the state's law did not bear a substantial relationship to its asserted legitimate interest in the orderly settlement of estates, the law at issue in *Trimble* was constitutionally flawed.

The reasoning in *Trimble* all but foreordained the result in *Lalli v. Lalli*, 439 U.S. 259 (1978), whose author – Justice Powell – also authored *Trimble*. *Lalli* involved a state law requiring that, before an illegitimate child could inherit through an intestate father, the child had to establish paternity in a judicial proceeding *prior to the death* of the putative father.[6] Contrasting the "broad

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[6] It is worth noting that the New York law upheld in *Lalli* was decidedly *less* generous than the Oklahoma law at issue here, which – as construed in this case by the Oklahoma Court of Civil Appeals – allows an individual to establish paternity not only through a pre-death judicial determination (as was the case with the law in *Lalli*), but also through written acknowledgment of paternity by the father, public acknowledgment of the child by the father or the subsequent

disqualification" of illegitimate intestate inheritance rejected in *Trimble*, the *Lalli* Court – citing a line of decisions dating back more than a century recognizing that states have "an interest of considerable magnitude" in the "orderly disposition of property at death," 439 U.S. at 268 – held that the state's interest in orderliness and accuracy in the estate proceeding sufficiently justified the proof requirement imposed by the statute at issue. "The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences." *Id.* at 271. Thus, because the statute was "substantially related to the important state interests the statute [was] intended to promote," *Lalli*, 439 U.S. at 275-76, the Court held that the statute satisfied constitutional requirements. *See also id.* at 273 (noting that the reach of the statute was not "far in excess of its justifiable purposes," as in *Trimble*).

Petitioner suggests two reasons why the petition should be granted and this Court's decision in *Lalli* overruled. *First*, Petitioner argues that subsequent developments in the case law have altered the legal landscape against which *Lalli* was set. *Second*, Petitioner asserts that developments in the use and accuracy of DNA identification have altered the factual landscape. Both contentions are without merit.

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marriage of the father to the child's mother. Okla. Stat. tit. 84, § 215 (1991).

A. The Subsequent Case Law Does Not Depart From *Lalli*

None of the three subsequent cases on which Petitioner relies – *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988) – signals any departure by this Court from the principles of *Trimble* and *Lalli*. Each of those cases involved not an effort to establish paternity in the context of an estate proceeding, but rather a claim for child support under a state statute mandating the provision of paternity benefits. Each merely represents an application of the unexceptional principle – recognized earlier in *Gomez v. Perez*, 409 U.S. 535 (1973) – that where a state decides to create a judicially enforceable right of a child to receive benefits from a father, there is no plausible state interest in excluding illegitimate children from the receipt of such benefits.

The question at issue in *Mills*, *Pickett*, and *Clark* was whether state laws requiring illegitimate children to establish paternity within one to six years of birth to receive paternal child support benefits violated the principle of *Gomez* by providing only an "illusory" opportunity to illegitimate children to establish paternity and thus to obtain child support. *Mills*, 456 U.S. at 97. As the Court recognized in *Mills*, the state might have a legitimate interest in avoiding "stale claims" for child-support benefits, *id.* at 99, but the one-year limitations period in that case – and the two- and six-year periods in *Pickett* and *Clark* – could not be justified on that basis because the states could not show that evidence would in fact

grow "stale" within the limitations period. *Clark*, 486 U.S. at 464-65; *Pickett*, 462 U.S. at 14-15; *Mills*, 456 U.S. at 101.

But the question whether there is a sufficient connection between the state interest in avoiding stale child-support claims and a rigid limitations period on filing such claims has nothing whatsoever to do with the question at issue here and in *Lalli* – i.e., whether there is a sufficient connection between the state interest in ensuring the orderly disposition of property upon death and requiring establishment of paternity prior to death. In *Lalli*, this Court expressly observed that "[t]he presence in this case of the State's interest in the orderly disposition of a decedent's property at death distinguishes it from others in which that justification for an illegitimacy-based classification was absent." *Lalli*, 439 U.S. at 268 n.6. Indeed, one of the cases explicitly distinguished by *Lalli* was *Gomez v. Perez*, 409 U.S. 535 (1973) – the fountainhead of the child-support trilogy. And, far from departing from *Lalli*, the very first case in that trilogy, *Mills*, approvingly cites *Lalli* as exemplifying a case in which a state statute affecting illegitimate children was in fact "substantially related to a legitimate state interest." *Mills*, 456 U.S. at 99. Even after the first *two* child-support cases relied upon by Petitioner had been decided, this Court again saw fit to reaffirm the core *Trimble/Lalli* principle. *See Reed v. Campbell*, 476 U.S. 852, 855 (1986) ("The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted.").

The *Mills-Pickett-Clark* trilogy, in sum, rests on the weakness of an asserted state interest that is fundamentally different from the state interest implicated in *Trimble* and *Lalli*. As such, the child support trilogy does nothing at all to undermine the continuing vitality of *Lalli* and the important principles that undergird it.

It is the same misreading of *Lalli* and *Trimble* that leads Petitioner to rely on an inapposite set of Social Security benefits cases in the Eleventh and Ninth Circuits in an effort to persuade the Court to review this – very different – case. Indeed, in the leading Eleventh Circuit decision on which Petitioner bases her claims of judicial retreat from *Lalli*, the court of appeals expressly acknowledged the important distinction between this Court's decision in *Lalli* and judicial disputes over Social Security benefits:

> Since the primary purpose of survivors benefits is to provide support for dependents of a deceased wage earner [citations omitted], we conclude that the governmental interests in this case – i.e., "preventing the prosecution of stale or fraudulent claims," *Mills*, 456 U.S. at 98 – are similar to those involved in other disputes over support. Thus, this case is more analogous to *Mills*, *Pickett* and *Clark* than to *Lalli*. Unlike *Lalli*, this case does not involve the orderly disposition of property at death.

Daniels v. Sullivan, 979 F.2d 1516, 1521 (11th Cir. 1992). As the court of appeals' reasoning demonstrates, the "conflict" between two federal circuits over the provision of survivors' benefits to illegitimate children under the federal Social Security Act is not one that concerns this case, or the Oklahoma estate law at issue here, in any way.

Even assuming the Court would be inclined to resolve a conflict when only two circuits have spoken to the issue, it obviously should do so in a case actually presenting Social Security survivors' benefits questions.

B. Subsequent Developments In DNA Testing Do Not Justify A Departure From *Lalli*

Petitioner's second – and final – argument for review is based on supposed advances in DNA technology that have improved the speed and accuracy of genetic identification. Petitioner insists that it is "high time" (Pet. at 3), for this Court to insert itself and the federal Constitution into the states' traditional dominion over estate administration and to override state policies requiring the establishment of paternity before death before an alleged illegitimate child may intercede in ongoing estate proceedings. Respondents respectfully disagree.

1. To begin with, whatever may be the truth of Petitioner's claims about advancements in DNA testing, Petitioner's reliance on those advancements as an argument for overruling *Lalli* is based on a fundamentally flawed premise. Petitioner's entire argument presupposes that the "often difficult problem of proving the paternity of illegitimate children" acknowledged in *Lalli*, 439 U.S. at 265, represents the entire sum and substance of the Court's longstanding tradition of deference to the states' judgments about how best to administer the estate proceedings of their residents. As seen from the discussion above, however, *Lalli* actually was following in an exceedingly long line of this Court's decisions recognizing the "interest of considerable magnitude" states have

in ensuring the orderly disposition of assets upon death, *Lalli*, 439 U.S. at 268 (citing cases), and the "substantial deference" courts accordingly owe to the schemes state legislatures devise for serving that interest, *Trimble*, 430 U.S. at 771. The lesson of these cases is not, as Petitioner would have it, that everything turns on the problems of proof in establishing paternity in an estate proceeding, but rather that state legislatures are much better situated to "regulate the disposition of property left [in the state] by a man dying there," *Labine*, 401 U.S. at 538, and that so long as the regulatory scheme the legislature devises is substantially related to legitimate state interests, there is no basis for federal judicial intervention. *See Lalli*, 439 U.S. at 273 ("Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.").

2. It is easy to see that the states' interest in the establishment of paternity prior to death as it relates to the disposition of their residents' assets upon death runs much deeper than concerns about problems of proof in the establishment of paternity – and thus that even if those problems are lesser in degree now than they were twenty years ago, the states still have interests directly served by a statutory scheme governing estate proceedings that requires the establishment of paternity prior to death. Indeed, the very facts of this case give the lie to Petitioner's suggestion that all is so well with DNA testing that courts need no longer bother with the parochial concerns of state legislatures. As Petitioner herself

acknowledges, if she has her way in this estate proceeding, the body of her putative father, dead for 38 years, will have to be exhumed and – as his own mother and her Rabbi see it – desecrated in order to evaluate Petitioner's claims of paternity. Their religious concern is hardly extreme: numerous mainstream religions regard exhumation of the dead as a violation of central tenets of faith.[7] As noted by the New York Court of Appeals:

> The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned. . . . *If the deceased had been a member of a faith which forbade disinterment*, if he had agreed with the cemetery corporation that there should be no exhumation whatsoever, if he had elected to be laid in hallowed earth and the request was for reburial in unconsecrated ground, then only *compelling considerations* would justify disinterment and removal.

Currier v. Woodlawn Cemetery, 90 N.E.2d 18, 19 (N.Y. 1949) (emphasis added). While a state may not necessarily be *required* to respect this sincerely and widely-held view, there can be no doubt but that states should be *allowed* to

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[7] As one state court observed:

> The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited, all civilized nations and many barbarous ones regard, in some measure at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was "God's Acre."

Dwenger v. Geary, 14 N.E. 903, 907 (Ind. 1888); *see also* 25 U.S.C. §§ 3001-3013 (Native American Graves Protection and Repatriation Act).

take such religious concerns into account in devising a system of rules governing the disposition of property upon death.

Indeed, even putting specifically religious concerns to one side, the point remains just as strong: surely a state has a legitimate interest in avoiding the extraordinary emotional stress that exhuming human remains would impose on the family members who are already suffering from the loss of their loved one.

Likewise, regardless of changes in the science of DNA testing, states also have a continuing interest in allowing their residents to decide for themselves the distribution of their property upon death. There is no judicially-enforceable "right" to inherit property. *Jefferson v. Fink*, 247 U.S. 288, 294 (1918); *In re Smith's Estate*, 107 P.2d 189, 190-91 (Okla. 1940); *see also Geller v. White*, Pet. App. at 8a-9a. Inheritance, rather, remains solely within the power and province of the testator. Thus a mentally competent father is freely able to distribute his estate among his children as he sees fit, which includes the freedom *not* to distribute to any given child. *Parnacher v. Mount*, 248 P.2d 1021, 1026 (Okla. 1952), *appeal after remand*, 306 P.2d 302 (Okla. 1956), *cert. denied*, 353 U.S. 958 (1957). In this scheme, the requirement of a pre-death paternity determination simply serves to allow a putative father to order his estate as he wishes, and to deal consciously with the claim of the illegitimate child before the father expires. Indeed, in this very case, Mrs. Geller became aware of Petitioner's claim and took steps in her will – as was her right under state law – to foreclose Petitioner's claim of any inheritance. (*See* Pet. App. at 2a-3a.). *See infra* at 25-26. But under the rule Petitioner would have this

Court adopt for cases other than this one – cases in which an illegitimate child has *not* alerted the putative father, who is also the testator, before his death – the father is deprived of his opportunity to distribute his property upon death in the manner he desires. In essentially requiring any child with an interest in estate recovery to come forward with a claim of paternity during the life of the father, Oklahoma's statutory scheme vindicates the father's right to organize the disposition of his assets upon his death as he sees fit. *Cf. Trimble*, 430 U.S. at 774 n.16 (distinguishing the issue of intestate succession from the specific intent expressed by a testator in disposing of his estate).

3. Petitioner's argument for overruling *Lalli* on the basis of subsequent developments in DNA testing overlooks all of these state interests, none of which has anything to do with problems of proof in the establishment of paternity. But even the merits of Petitioner's ultimately quite narrow fact-based argument for overruling *Lalli* – that DNA testing is now so nearly perfect and foolproof that it may safely be imposed by judicial fiat on the rules states otherwise choose to adopt for the establishment of paternity in estate proceedings – are not so incontestable that a federal constitutional rule ought to immediately supersede the considered judgments of the state legislatures in this area.

The simple point, recognized in *Lalli*, 439 U.S. at 526, is that requiring that paternity be determined during the lifetime of the putative father still *enhances* the fact-finding process. No one contends that genetic testing is

100% conclusive;[8] indeed, under our judicial system genetic testing can be, at the very best, only an evidentiary means of proving an ultimate fact. Jean E. Maess, Annotation, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R.4th 167 (1985) (collecting cases at Section 5). The presence of the putative father in that fact-finding process remains, in short, critical to the judicially-authoritative assessment of paternity – as evidenced most clearly by the many reported cases in which factfinders necessarily *reject* seemingly conclusive DNA evidence.[9]

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[8] Indeed, genetic testing is subject to many disputes, including (i) reliability of the testing process; (ii) the lack of exhaustive peer scrutiny due to the small forensic scientific community; (iii) population grouping; and (iv) the issue of band shifting. *See* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 La. L. Rev. 379 (1997); Richard A. Nakashima, *DNA Evidence in Criminal Trials: A Defense Attorney's Primer*, 74 Neb. L. Rev. 444 (1995); Allan Sincox & Marijane Hemza-Placek, *Challenging the Admissibility of DNA Testing*, 83 Ill. B.J. 170 (1995); Jonathan J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 Jurimetrics J. 21 (Fall 1993).

As one state court frankly admitted,

> As is often the case, percentages and statistics used by scientists are baffling to the legal profession. We admit to being somewhat befuddled by the scientific nature of this record, the scientific shorthand and the various probability figures which seem contradictory.

Johnson v. Gant, 516 So. 2d 1275, 1276 (La. Ct. App. 1987).

[9] In a substantial number of cases, the fact-finder has rejected seemingly-conclusive DNA results in favor of the father's denial of paternity. *See, e.g., Suire v. Robison*, 511 So.2d 35, 36 (La. Ct. App. 1987) (rejected DNA result of 97.28%

Requiring a post-death paternity proceeding would, in many cases, transform the genetic evidence into just that kind of conclusive effect,[10] depriving the putative father of the opportunity to organize his own estate, *see supra* at 18-19, and to defend his reputation and good name. *Lalli*, 439 U.S. at 271; *Pryor v. Jump*, 83 P.2d 828 (Okla. 1938).

4. Finally, Petitioner's proposed constitutional rule would also raise at least one virtually intractable problem of judicial administration: defining the logical stopping

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probability); *State v. Hogan*, 613 So.2d 681, 682 (La. Ct. App. 1993) (rejected 99.99% probability of parenthood); *State v. Hagen*, 382 N.W.2d 556, 559 (Minn. Ct. App. 1986) (rejected 99.62% probability); *Chisolm v. Eakes*, 573 So.2d 764, 765 (Miss. 1990) (rejected 99.59649% probability); *In the Matter of Denise H.*, 522 N.Y.S.2d 920 (App. Div. 1987) (rejected results of HLA test); *In the Matter of Kathleen "EE"*, 490 N.Y.S.2d 627 (App. Div. 1985) (rejected 98.1% probability); *Smith v. Shaffer*, 515 A.2d 527, 527-28 (Pa. 1986) (rejected 99.99% probability). *See also Campbell v. Apfel*, 177 F.3d 890, 891 (9th Cir. 1999) (noting that in related state child support proceeding, a genetic test determined that there existed a 98.14% probability that Schmidt was the father, but Schmidt denied paternity and the California state court denied the child's request for temporary child support).

[10] The facts of this case are a perfect example: the Petitioner was conceived over 40 years ago, the putative father is long since dead, and any non-DNA evidentiary trail has gone completely cold. As Justice Jackson observed in another context, permitting this case to go forward would allow the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-89 (1944). While a legislature might reach the result Petitioner advocates, there is certainly no constitutional compulsion to require such an ancient claim to be advanced.

point of DNA proof of paternity in estate proceedings. This case itself involves not the estate of the putative father, but rather the estate of his mother – Petitioner's putative *grandmother*. Presumably, Petitioner does not mean to contend that the descendants of Thomas Jefferson and Sally Hemings have a federal constitutional right to intercede in an estate proceeding involving the previously acknowledged heirs of Jefferson, but there is nothing in either the Constitution itself or the Court's cases immediately suggesting where a line between cognizable and noncognizable claims of alleged illegitimate children could be drawn. The real point, however, is that it is the states, and not the federal judiciary, that have traditionally made just these kinds of decisions in regard to the disposition of property upon death. The elected representatives of the people of Oklahoma chose to draw their "line" at the establishment of paternity in one of several ways before the death of the father, and there is no basis in law or fact for invalidating that choice.[11]

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[11] Petitioner timidly advances one alternative – the use of a claims procedure (Pet. at 16 n.4) – but, even aside from the dubious constitutional source for such a procedure, that suggestion concedes the point made in the text: Petitioner's constitutional rule would invite not finality but an escalating round of constitutional litigation over, among other items, (i) the adequacy of the notice provided; (ii) the minimum time period constitutionally required to assert claims; (iii) the adequacy of the search for possible offspring and (iv) issues of retroactivity. Petitioner would therefore substitute uncertainty and rounds of litigation for the clear and unambiguous rule approved in *Lalli* and adopted by the Oklahoma legislature.

II. THIS CASE IS UNIQUE AND WOULD NOT MAKE A SUITABLE VEHICLE FOR REVIEWING THE COURT'S DECISIONS IN THIS AREA

Apart from the two reasons Petitioner advances for overruling established precedent in *Lalli*, Petitioner says almost nothing at all about the suitability of this case in particular as a platform for launching this new constitutional assault. Yet the instant case is an unsuitable vehicle for reexamining *Lalli* for reasons unrelated to any question of constitutional law. Even if the problems of proof were the only relevant consideration in the Court's approval of the requirement of a "before death" paternity determination in *Lalli*, and even if advances in technology and DNA testing have rendered that consideration irrelevant – neither of which Respondents believe to be true – the Court should decline to grant certiorari in this case because the decision of the Oklahoma Court of Civil Appeals was correct on independent state law grounds. Although these grounds were addressed by the parties below, they were not ruled on by the lower courts because of the threshold determination that Petitioner lacked standing under Oklahoma law to contest Mrs. Geller's Will. Nevertheless, these grounds would be dispositive against Petitioner on any remand. Granting certiorari in this case would therefore be a waste of scarce judicial resources resulting in, at most, an advisory opinion that would not grant the Petitioner any relief.

A. Petitioner Is Time-Barred From Initiating A Paternity Action Regardless Of Whether Oklahoma Law Allows A Post-Death Paternity Determination

Petitioner notes that "[m]ost if not all 50 states, prodded by Congress, now give children 18 or more years to establish paternity against living fathers obligated to pay child support" (Pet. at 9.). Oklahoma law is in accord, and Okla. Stat. tit. 70, § 70(D) (1998 Supp.) allows an illegitimate child 19 years to commence a paternity proceeding. Under Section 70(D), Petitioner's right to initiate a paternity proceeding against Jay Myers expired on her nineteenth birthday.

The record reflects that Petitioner did not even learn of Jay Myers' existence until she was over 30 years old. *See supra* at 2. Thus, even if Petitioner were correct in asserting that the Constitution requires that an illegitimate child be allowed the same time period to "judicially determine" paternity for inheritance purposes, when the putative father is deceased, as such child has to bring a paternity action to obtain child support against a living father, Petitioner's claim is still time-barred. Oklahoma's statute of limitations governing paternity actions flatly forbids an illegitimate child from *commencing* a paternity proceeding when that child is 40 years old, as Petitioner seeks, and nothing in the *Mills*, *Pickett*, and *Clark* trilogy suggests that such a statute of limitations is constitutionally impermissible.

Nor is there any provision in Oklahoma law for extending the time to bring a paternity action merely

because the mother of the illegitimate child did not disclose to the child the identity of her putative father until the child was 30 years old. There is no "discovery" provision in Okla. Stat. tit. 10, § 70(D). The statute plainly and unequivocally states that a paternity action shall be available to a child "if commenced within one (1) year after the child reaches the age of eighteen (18)." On the child's nineteenth birthday, Oklahoma law bars the initiation of a paternity action, regardless of whether such action is initiated for support, inheritance, or other purposes, and regardless of whether the putative father is living or deceased. Because the decision of the Oklahoma Court of Civil Appeals was correct on this alternative state law ground, this Court should not grant certiorari to issue an advisory opinion that will grant Petitioner no relief.

B. Mrs. Geller Disinherited Petitioner In Her Will

It is undisputed that Mrs. Geller executed her Last Will and Testament *after* Petitioner had contacted her claiming to be Mrs. Geller's born-out-of-wedlock granddaughter. In anticipation of Petitioner asserting a claim against her estate, Mrs. Geller expressly directed Mr. Fist to insert a forced heirship clause into her Will, which specifically bequeathed one dollar ($1.00) to any person not mentioned in the Will "who would inherit a portion of my estate had I not executed this Will."

Oklahoma's "pretermitted heir" statute, Okla. Stat. tit. 84, § 132, generally provides that when a testator unintentionally omits a grandchild in Petitioner's alleged position, that grandchild must inherit as if the testator had died intestate. In *Estate of Woodward*, 807 P.2d 262

(Okla. 1991), the Oklahoma Supreme Court "adopt[ed]" the view taken by the California Supreme Court of "a pretermitted heir statute which is similar to Oklahoma's," *id.* at 264, in a case in which the California court had held that general language of disinheritance would be operative against an heir who was not specifically mentioned in the will, so long as the testator refers to an identifiable, interested class to which the putative heir belongs, *see id.* (citing *Estate of Gardner*, 580 P.2d 684 (Cal. 1978)).[12] And in the California case followed in *Woodward*, the California Supreme Court specifically observed that the phrase *"those who would take if I died intestate"* is just such a description. *Gardner*, 580 P.2d at 685.

That language is almost identical to the actual words used by Mrs. Geller in her forced heirship clause, and is wholly indistinguishable in intent, meaning, and effect. It is therefore perfectly clear that Petitioner has, in all events, no viable claim for recovery from Mrs. Geller's estate under Oklahoma law. Should the Court take this case to revisit *Lalli* and strike down § 215, that action would be irrelevant to the ultimate disposition of Petitioner's claims.

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[12] *See also Spaniard v. Tantom*, 267 P. 623, 625 (Okla. 1928) ("Our statute being identical with the California statute the construction placed thereupon by the California Supreme Court is very persuasive."); *Estate of Kane*, 828 P.2d 997, 999 (Okla. Ct. App. 1992) (citing and following 1890 California Supreme Court decision construing California's pretermitted heir statute because said statute "was almost identical to [Okla. Stat. tit. 84, § 132]").

CONCLUSION

As this Court has frequently observed, the purpose of certiorari is not to settle the private issues between the parties, but to resolve issues of fundamental importance. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). As noted throughout this response, (i) no decision of this Court has questioned or undermined the continued vitality of *Lalli*; (ii) the policy reasons underlying *Lalli* are markedly different from those asserted in the child support cases on which Petitioner relies; and (iii) the unique facts render this case unsuited for a re-examination of *Lalli*. For all these reasons, *Lalli* remains good law and should not be overruled.

Respectfully submitted,

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RESPONDENTS' APPENDIX A

Okla. Stat. tit. 10, § 70 (1998 Supp.)

**Presumption of maternity –
Proceedings to Establish Paternity**

A. Except as otherwise provided by law, a woman who gives birth to a child is the natural mother of the child.

B. Paternity may be established by:

1. A notarized written statement of the father and mother acknowledging paternity pursuant to Section 1-311.3 of Title 63 of the Oklahoma Statutes. A statement acknowledging paternity shall have the same legal effect as an order of paternity entered in a court or administrative proceeding.

a. The statement may be rescinded by the mother or acknowledging father within sixty (60) days after the statement is signed by filing a signed rescission of affidavit acknowledging paternity form with the Office of the State Registrar of Vital Statistics.

b. If the mother was married at the time of conception or birth, and her husband is not the natural father of the child, and the time to dispute paternity pursuant to Section 3 of this title has not expired, the husband may sign a husband's denial of paternity form, which must be filed along with the affidavit acknowledging paternity.

c. The rescission of affidavit acknowledging paternity and the husband's denial of paternity forms shall be prescribed by the Department of Human Services and made available at the same locations as the affidavit

acknowledging paternity provided for in Section 1-311.3 of Title 63 of the Oklahoma Statutes.

2. Scientifically reliable genetic tests, including but not limited to blood tests;

3. District or administrative court order; or

4. As otherwise provided by law.

C. Proceedings to establish paternity may be brought in the appropriate district court or through the Department of Human Services, Office of Administrative Hearing: Child Support. Proceedings may be brought by the mother, father, guardian, or custodian of the child, the Department of Human Services, the district attorney, a public or private agency or authority chargeable with the support of the child, or by the child. The court, after determining paternity in a civil action, shall enter an order providing for the support and maintenance of the child. The social security numbers of both parents and the child shall be included on the child support order summary form provided for in Section 120 of Title 43 of the Oklahoma Statutes which shall be filed with all orders establishing paternity. The district court may further make provision for custody and visitation based upon the best interests of the child.

D. An action to establish paternity shall be available to a child if commenced within one (1) year after the child reaches the age of eighteen (18).

RESPONDENTS' APPENDIX B

Okla. Stat. tit. 84, § 132 (1991)

Provision for children unintentionally omitted

When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.